

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HENRY C. HAYES, III,

Plaintiff,

-against-

JOHN DOE, PUBLIC DEFENDER,

Defendant.

24-CV-7601 (LTS)

ORDER OF DISMISSAL UNDER
28 U.S.C. § 1915(g)

LAURA TAYLOR SWAIN, Chief United States District Judge:

Plaintiff, who is currently detained in the Westchester County Jail (“WCJ”), brings this action *pro se*. Plaintiff also requests to proceed without prepayment of fees, that is, *in forma pauperis* (“IFP”). Plaintiff is barred, however, from filing any new action IFP while he is a prisoner. *See Hayes v. City of New Rochelle*, ECF 1:14-CV-4733, 4 (LAP) (S.D.N.Y. Jan. 9, 2015). That order relied on the “three-strikes” provision of the Prison Litigation Reform Act (“PLRA”), 28 U.S.C. § 1915(g), which provides that:

In no event shall a prisoner bring a civil action [IFP] if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.¹

¹ Among the dismissals identified by the court when imposing the bar order are the following three strikes: *Hayes v. City of New Rochelle Police Dep’t*, No. 12-3118-cv (2d Cir. Nov. 20, 2013) (appeal filed while Plaintiff was held in WCJ dismissed as frivolous); *Hayes v. City of New Rochelle, NY*, No. 13-CV-1461 (LAP) (S.D.N.Y. Aug. 2, 2013) (action filed while Plaintiff was held in WCJ dismissed for failure to state a claim on which relief may be granted); *Hayes v. Kershaw Cnty. Det. Ctr.*, No. 00-CV-2894 (D.S.C. Sept. 25, 2000) (action filed while Plaintiff was in the Columbia Restitution Center; recommending dismissal because Plaintiff did not state a claim against defendants), *report & recommendation adopted*, (D.S.C. Nov. 7, 2000).

Although Plaintiff has filed this new action seeking IFP status, his complaint does not show that he is in imminent danger of serious physical injury.¹ Instead, Plaintiff brings claims of negligence and legal malpractice against a public defender who represented him in prior criminal proceedings. Plaintiff is therefore barred from filing this action IFP.

CONCLUSION

The Court denies Plaintiff's request to proceed IFP, and the complaint is dismissed without prejudice under the PLRA's "three-strikes" rule. *See* 28 U.S.C. § 1915(g).² Plaintiff remains barred from filing any future action IFP while he is in custody, unless he is under imminent threat of serious physical injury.³ *Id.*

The Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that any appeal from this order would not be taken in good faith, and therefore IFP status is denied for the purpose of an appeal. *See Coppedge v. United States*, 369 U.S. 438, 444-45 (1962).

¹ An imminent danger is one "existing at the time the complaint is filed." *Malik v. McGinnis*, 293 F.3d 559, 563 (2d Cir. 2002). A danger "that has dissipated by the time a complaint is filed" is not sufficient. *Pettus v. Morgenthau*, 554 F.3d 293, 296 (2d Cir. 2009).

² Plaintiff may commence a new action by paying the filing fees. If Plaintiff does so, that complaint will be reviewed under 28 U.S.C. § 1915A, which requires the Court to dismiss *any* civil rights complaint from a prisoner if it "(1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or (2) seeks monetary relief from a defendant who is immune from such relief." 28 U.S.C. § 1915A(b).

³ The Court may bar any vexatious litigant (including a nonprisoner) from filing future actions (even if the filing fee is paid) without first obtaining leave from the Court. *See In re Martin-Trigona*, 9 F.3d 226, 227-30 (2d Cir. 1993) (discussing sanctions courts may impose on vexatious litigants, including "leave of court" requirement).

The Court directs the Clerk of Court to enter judgment in this action.

SO ORDERED.

Dated: October 31, 2024
New York, New York

/s/ Laura Taylor Swain

LAURA TAYLOR SWAIN
Chief United States District Judge